

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

VS.

AUSTEN G. BROWN and MARIAN B. KEN-
YON, Executors of the Estate of FREDERICK
L. BROWN, Deceased,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California
Central Division

FILED

AUG - 6 1942

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

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E. H. MITCHELL,
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For Appellee:

CLARK J. MILLIRON,
518 Fidelity Bldg., Los Angeles, Calif. [1*]

In the District Court of the United States, Southern
District of California, Southern Division.

At Law No. 1400-Y

AUSTEN G. BROWN and MARIAN B. KEN-
YON, Executors of the Estate of FREDER-
ICK L. BROWN, Deceased,

Plaintiffs,

vs.

THE UNITED STATES,

Defendant.

*Page numbering appearing at foot of page of original certified Transcript of Record.

COMPLAINT

I.

Plaintiffs bring this action against the United States under the provisions of 28 U. S. Codes, Sec. 41, paragraph 20, for the recovery of estate tax paid to the Collector of Internal Revenue, Sixth District of California, in a sum less than \$10,000.00, as hereinafter more fully appears.

II.

The plaintiffs, Austen G. Brown and Marian B. Kenyon, at all times herein mentioned were and now are the duly appointed, qualified and acting executors of the last Will and Testament of Frederick L. Brown, deceased, who died on the 8th day of August, 1934; the said plaintiffs having qualified on August 31, 1934, as Executors, in the Superior Court of the State of California, in and for the County of San Diego, and bring this action in their capacity as such Executors.

III.

That on the 15th day of August, 1923, the aforesaid Frederick L. Brown, deceased, and his wife Marian M. Brown, deceased, [2] by an instrument in writing, created a certain Trust whereby 130¼ shares of the capital stock of Gardena Syndicate, a corporation organized and existing under and by virtue of the laws of the State of California, were by them transferred and delivered to Frederick L.

Brown, F. Walton Brown and Austen G. Brown, or the successors of them, as trustees, and whereby said Frederick L. Brown transferred all of his right, title and interest in and to said 130¼ shares of stock to said trustees, and retained no right, title or interest in or to, or control over said shares of stock, or any thereof, in said Frederick L. Brown and/or said Marian M. Brown; said trust and an irrevocable trust providing that certain amounts of money were to be paid to the trustors, certain amounts were to be accumulated, and certain amounts were to be paid to other beneficiaries; said trust to terminate on the death of said Frederick L. Brown, deceased, and Marian M. Brown, deceased, and that said trust was never revoked or modified, and said trust terminated, according to its term, on February 8, 1940, on the death of said Marian M. Brown, a copy of which said trust indenture is a part of Exhibit "A" attached hereto and made a part hereof the same as if fully set forth herein. No right of alteration or amendment, or other right of revocation or control was retained by decedent or his said wife Marian M. Brown, deceased, either alone or with any other person.

IV.

The aforesaid trust was not created in contemplation of death, nor was it intended to take effect in possession or enjoyment at or after death of the decedent.

V.

That on or about June 10, 1935, the plaintiffs herein as Executors, duly filed an estate tax return for said estate with the Collector of Internal Revenue of the Sixth District of California, in which said return the plaintiffs claim that the aforesaid trust [3] was not subject to estate tax and no value whatsoever was placed upon the assets of said trust in said return. The return, as filed, disclosed that no estate tax whatsoever was due from said estate.

VI.

Thereafter the Treasury Department of the United States, by or through the Commissioner of Internal Revenue, caused the Internal Revenue Agent in Charge at Los Angeles, California, to make an investigation of the assets of said estate for the purpose of determining the amount of estate tax due to the United States and on July 3, 1936, the Commissioner of Internal Revenue issued a deficiency letter, bearing the symbols MT-ET-7083-6th California, and in which said deficiency letter the said Commissioner wrongfully and illegally determined the total value of the gross estate subject to estate tax to be the sum of \$189,552.82, and in which said gross estate the Commissioner wrongfully and illegally included, as a part of the estate subject to tax, the value of 31% of the aforesaid 130 $\frac{1}{4}$ shares of stock in said Gardena Syndicate owned by the Trustees aforesaid and wrongfully and illegally determined the value of said portion of said stock to

be the sum of \$142,552.05; claiming that said portion of said stock should be included in the gross estate under the provisions of Section 302(c) of the Revenue Act of 1926, as amended. A copy of said deficiency letter is attached hereto, marked Exhibit "B" and made a part hereof the same as if the said letter were fully set forth herein.

VII.

That neither the said 31% of the said 130¼ shares of stock of said Gardena Syndicate nor any other per cent or portion of said stock is, or at any time herein mentioned was, a part of said estate of said Frederick L. Brown, deceased.

That neither the said value of 31% of the said 130¼ shares of stock of said Gardena Syndicate, so wrongfully and il- [4] legally determined to be the sum of \$142,552.05, nor any part of the value of the said stock is, or at any time herein mentioned was, a part of said estate of said Frederick L. Brown, deceased.

VIII.

The Commissioner determined that the plaintiffs were entitled to deductions under the provisions of the Revenue Act of 1926 in the amount of \$107,779.85, leaving a net estate wrongfully and illegally claimed to be subject to tax under the Revenue Act of 1926 in the amount of \$81,772.97. The Commissioner further determined that the plaintiffs were entitled to deductions under the provisions of the Revenue Act of 1932 in the amount of \$57,779.85,

leaving a net estate wrongfully and illegally claimed to be subject to tax under the Revenue Act of 1932 in the amount of \$131,772.97; whereupon the Commissioner of Internal Revenue wrongfully and illegally determined that there was an estate tax due from the plaintiffs in the amount of \$8,735.70.

IX.

The Treasury Department of the United States, by and through the Commissioner of Internal Revenue, in accordance with and pursuant to said deficiency letter, in the month of February, 1937, wrongfully and illegally made an assessment of the aforesaid estate tax against the plaintiffs, as Executors, in the amount of \$8,735.70, together with interest in the amount of \$798.90, being a total tax and interest of \$9,534.60 wrongfully and illegally assessed; whereas in truth and in fact there was no tax or interest in any amount due from the plaintiffs.

X.

Thereafter the Collector of Internal Revenue of the 6th District of California made demand upon the plaintiffs in their capacity as Executors of aforesaid estate for the payment of said tax so wrongfully and illegally assessed, and in order to avoid [5] penalties, interest, distraint and/or summary proceedings for the collection of said tax, the plaintiffs, in their capacity as Executors, as aforesaid, on March 1, 1937, pursuant to said demand, made payment to said Collector of Internal Revenue of the 6th District of California, of the total amount

of tax and interest as aforesaid in the amount of \$9,534.60.

XI.

Plaintiffs allege that in truth and in fact the total gross estate of the aforesaid estate was the sum of \$47,000.77, and no more, that said amount included each and every item returned by the plaintiffs and valued by the Commissioner of Internal Revenue, with the exception of the aforesaid 31% of said stock of Gardena Syndicate owned by the aforesaid trustees, of a value of \$142,552.05.

XII.

That the plaintiffs are entitled to deductions from the aforesaid gross estate, under the provisions of the Revenue Act of 1926 in the amount of \$107,779.85, leaving no net estate subject to tax under the Revenue Act of 1926.

XIII.

That plaintiffs are entitled to deductions under the provisions of the Revenue Act of 1932 in the amount of \$57,779.85, leaving no net estate subject to tax under the provisions of the Revenue Act of 1932, and that no estate tax in any amount was properly due from plaintiffs or said estate.

XIV.

On December 15, 1939, plaintiffs duly filed a claim for refund of the aforesaid estate tax and interest in the amount of \$9,534.60, a copy of which said claim for refund is attached hereto, marked Ex-

hibit "A" and made a part hereof, the same as if said claim had been fully set forth herein. [6]

XV.

That on April 1, 1940, the Commissioner of Internal Revenue wrongfully and illegally rejected said claim for refund and wrongfully and illegally refused to pay plaintiffs the money, or any part thereof, asked for and demanded in said claim for refund, which said rejection was made in a letter bearing symbols MT-ET-70S3-6th California, a copy of which said letter is attached hereto, marked Exhibit "C" and made a part hereof the same as if it were fully set forth herein.

XVI.

That no part of said tax has ever been repaid, refunded, credited or otherwise made available to plaintiffs herein. Wherefore the plaintiffs averring that they are entitled to said refund, bring this action in this court pursuant to the Statutes of the United States to recover said estate tax illegally assessed and collected, as aforesaid.

Wherefore, plaintiffs demand judgment against the said defendant in the sum of \$9,534.60, with interest thereon at 6% per annum from March 1, 1937, and for costs herein expended, and for all other and proper relief.

CLARK J. MILLIRON

Attorney for Plaintiffs,
518 Fidelity Building,
Los Angeles, California.

(Duly Verified.)

[7]

EXHIBIT A

Form 843

Treasury Department
Internal Revenue Service
(Revised April 1940)
Copy.

CLAIM

To Be Filed with the Collector Where Assessment
Was Made or Tax Paid.

The Collector will indicate in the block below the
kind of claim filed, and fill in the certificate on the
reverse side.

Refund of Tax Illegally Collected.

Refund of Amount Paid for Stamps Unused, or
Used in Error or Excess.

Abatement of Tax Assessed (not applicable to
estate or income taxes).

State of California

County of San Diego—ss:

Name of taxpayer or purchaser of stamps, Es-
tate of Frederick L. Brown, Deceased, Austen G.
Brown and Marian B. Kenyon, Executors.

Date of death, August 8, 1934.

Business address, c/o Brown, Bissell & Berry,
Attorneys, 912 Rowan Bldg., Los Angeles, Califor-
nia.

Residence, 230 Prospect Street, La Jolla, Califor-
nia.

The deponent, being duly sworn according to law,

EXHIBIT A—(Cont.)

deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed Los Angeles Sixth District, California.

2. Period (if for income tax, make separate form for each taxable year) from...., 19.., to...., 19...

3. Character of assessment or tax, Estate tax.

4. Amount of assessment, \$9,534.60; dates of payment, March 1, 1937.

5. Date stamps were purchased from the Government.....

6. Amount to be refunded, Tax \$8735.70, interest \$798.90—\$9,534.60.

7. Amount to be abated (not applicable to income or estate taxes).... \$......

8. The time within which this claim may be legally filed expires, under Section 810(a) of the Revenue Act of 1932, on March 1, 1940.

The deponent verily believes that this claim should be allowed for the following reasons:

As shown by the attached sworn statement of F. Walton Brown.

That the original estate tax return for the estate of Frederick L. Brown, deceased, was made by the undersigned Austen G. Brown and Marion Brown Kenyon, as executors of said Estate and the tax, of which

EXHIBIT A—(Cont.)

refund is sought, was paid by them as such executors and that they are now the duly qualified and acting executors of said estate.

Signed MARIAN B. KENYON

AUSTEN G. BROWN

Executors of the Estate of
Frederick L. Brown, Deceased.

Sworn to and subscribed before me this 27 day of
November 1939.

MADALENE MAHER

Notary Public.

My com. Exp. Apr. 21, 1942. [8]

CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax: (Show, in the ninth column, by symbols "Pd.," "Ab.," or "Cr.," the nature of each entry in the eighth column.)

Class of tax and taxable year or period—Assessment List, List, Month, Year—Account No. or Page, Line—Amount assessed. Total, \$. . . .—Claim No. . . .

Paid, Abated, or Credited, Date, Amount—Total, \$\$.

Pd. Ab. Cr.

I certify that the records of this office show the following facts as to the purchase of stamps:

To Whom Sold or Issued—Kind—Number—De-

EXHIBIT A—(Cont.)

nomination—Date of sale or issue—Amount \$.

If special tax stamp, state: Serial number, Period commencing—.

.,

Collector of Internal Revenue.

.

(District)

Claim examined by.

Claim approved by

.

Chief of Division.

COMMITTEE ON CLAIMS

Amount claimed \$.

Amount allowed \$.

Amount rejected \$.

INSTRUCTIONS

1. The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered

EXHIBIT A—(Cont.)

without charge by any collector, deputy collector, or internal revenue agent.

3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

4. Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

State of California

County of Los Angeles—ss.

F. Walton Brown, being first duly sworn, deposes and says:

That Austen G. Brown and Marion Brown Kenyon, the Executors of the Estate of Frederick L. Brown, deceased, who died August 8, 1934, duly filed

EXHIBIT A—(Cont.)

an estate tax return with the Collector of Internal Revenue at San Diego, California, on June 10, 1935, in which said return they showed no estate tax to be due. Thereafter an Internal Revenue Agent made an examination and valuation of the assets of the estate and made certain changes in the various items therein. In the revaluation of the estate, and acting upon said report, the Commissioner of Internal Revenue determined that 31% of 130 $\frac{1}{4}$ shares of Gardena Syndicate, amounting to \$142,552.05, should be added to the gross estate, under the provisions of Section 302(c) of the Revenue Act of 1926, as amended, and on the theory that the decedent had made a transfer in trust of said stock under a trust indenture wherein he retained the right to receive a portion of the income from the trust estate during his lifetime, and that during the lifetime of said decedent the proportion of the income from the trust estate received by him amounted to approximately 31% of the total income of the trust estate during his lifetime, and therefore, that 31% of the value of said shares in Gardena Syndicate were taxable as a part of the estate of the deceased.

The decedent during his lifetime and on the 15th day of August, 1923, transferred to Frederick L. Brown, F. Walton Brown and Austen G. Brown, as trustees 130 $\frac{1}{4}$ shares of the capital stock of Gardena Syndicate, a California corporation. Under the trust indenture it was provided that the trustor should receive from the income of the trust estate

EXHIBIT A—(Cont.)

the sum of \$30,000.00, and in addition should receive from such income the sum of \$500.00 per month during his lifetime; that his wife should receive from such income during [9] her lifetime the sum of \$500.00 per month; and that in addition to the above, the trustor was to receive one-fifth of any income in excess of the amounts specifically provided to be distributed as aforesaid. That during his lifetime, as a result of such provisions of said trust, the decedent actually received approximately 31% of the total income of said trust, which said 31% included said \$30,000.00, the monthly income of \$500.00, and one-fifth of the excess income above mentioned.

That there is attached hereto a copy of the trust indenture herein referred to. That said indenture was irrevocable and was in full force and effect at the time of the death of said Frederick L. Brown. That the entire tax for which refund is claimed by the Executors resulted from the inclusion in the gross estate of said decedent of the sum of \$142,552.05 as the valuation of said 31% of 130¼ shares of Gardena Syndicate, as without the inclusion of said stock the estate of said decedent was not subject to tax. That said trust was not a transfer of property in contemplation of death, for the following reasons:

That said decedent at the time of the execution of said trust agreement in August of 1923 was in excellent health and was of the age of about fifty-six years, and that the transfer of said 130¼ shares

EXHIBIT A—(Cont.)

of Gardena Syndicate stock into said trust was intended and made by said decedent as a gift to his wife and children. That affiant is the son of said decedent and is familiar with the facts and circumstances surrounding the transfer of said 130 $\frac{1}{4}$ shares of Gardena Syndicate stock into the trust above mentioned by said decedent, and with the motives which actuated him in making said transfer.

That said stock was acquired by said decedent about the year 1906. That about the year 1915 an oil well was being drilled in the vicinity on the property owned by said Gardena Syndicate, [10] and at the time said well was being drilled affiant and his father, the said decedent, made several trips to said property and the well being drilled in the vicinity thereof, and that on said trips said decedent discussed with affiant the possibility of the production of oil on the property of said Gardena Syndicate, and said decedent stated that if he ever got money from oil from said property he would divide the same with his wife and three children, F. Walton Brown, Marion Brown, now Marion Brown Kenyon, and Austen G. Brown. That said well was unsuccessful and that thereafter there seemed no possibility of oil development in that vicinity until said Gardena Syndicate commenced negotiations for an oil lease on said property to Burnham Exploration Company about the year 1922. That such a lease was made and the drilling of an oil well was commenced on the property of said Gardena Syndicate

EXHIBIT A—(Cont.)

during the year 1922, and during the early part of the year 1923 a discovery of oil was made upon said property.

That at the time of negotiations for said lease and frequently thereafter, and up to the time of the execution by said decedent of said trust agreement in August of 1923, said decedent discussed with affiant the division with his children and his wife of the money to be received from oil on said property, and referred to his former promises to divide the same with his wife and children, and stated that he intended to retain one-fifth of his stock in said Gardena Syndicate, and to give one-fifth to his wife, and one-fifth to each of his said three children, in order that the income therefrom might be received individually by each of said five persons, and in order that said decedent would not have to pay a high rate of income tax thereon, and also in order that his said wife and children should have the opportunity to handle and spend his own money and to live comfortably without being dependent upon the bounty of said decedent. That affiant called the attention of [11] said decedent to the fact that the amount of income to be received from said property, and the continuance thereof, was extremely speculative and uncertain, and that neither affiant nor his brother nor sister would be willing to accept such a gift unless the continuance of a substantial income to said decedent and his wife, their mother, was in

EXHIBIT A—(Cont.)

some manner assured during the period of oil production. That said decedent then requested affiant to work out a plan which would accomplish this purpose, and affiant thereupon prepared and discussed with said decedent the form of trust agreement which was finally entered into on August 15, 1923, a copy of which is hereto annexed.

That at the time of the execution of said trust agreement and at various times thereafter said decedent stated that he greatly appreciated the attitude of his children in desiring to protect himself and their mother in the enjoyment of a substantial income while the oil wells on said property lasted, but that he did not expect to live highly himself and if the income should be lower than the amount reserved to himself and his wife that he would still give a portion thereof to his children.

That on many occasions both before and after the execution of said trust agreement and the transfer of said stock to the trustees thereof, said decedent stated to affiant that his belief was that it was far better for his family to have experience in the handling of money and to learn to use it judiciously than to have it doled out to them by him.

That said transfer by said decedent was not made by said decedent from any motive connected with or in contemplation of death and was intended by said decedent as a gift to his wife and said children.

(Sgd) F. WALTON BROWN

EXHIBIT A—(Cont.)

Subscribed and sworn to before me this 21 day of October, 1939.

ASTRID ROGNES

Notary Public in and for the County of Los Angeles, State of California. [12]

TRUST INDENTURE

This Indenture made this 15th day of August, 1923, by and between Frederick L. Brown and Marian M. Brown, his wife, and Frederick L. Brown, F. Walton Brown and Austen G. Brown, trustees for Frederick L. Brown, Marian M. Brown, F. Walton Brown, Austen G. Brown and Marion Brown Kenyon,

Witnesseth:

That said Frederick L. Brown in consideration of the love and affection he bears towards his said wife, Marian M. Brown, and his children, F. Walton Brown, Austen G. Brown and Marian Brown Kenyon, does hereby by these presents transfer, convey, assign and set over unto the said Frederick L. Brown, F. Walton Brown, and Austen G. Brown, trustees, and their successors or successor, the following described property, to wit:

130 $\frac{1}{4}$ shares of the capital stock of the Gardena Syndicate, a corporation organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in the City of Los Angeles, evidenced by Certificate No.

EXHIBIT A—(Cont.)

147 to be held by said Frederick L. Brown, F. Walton Brown and Austen G. Brown, and their successors or successor in trust for the following uses and purposes:

First: During the natural life of said Frederick L. Brown, and Marian M. Brown and the survivors of them, the trustees or trustee hereunder shall have, hold and control all of said property, and shall have and exercise all of the rights and powers of the holder of the legal title thereof, for the purpose of managing and controlling the same, and the rights and interests represented thereby, in such manner as to said trustees or trustee may seem for the best interests of said trust, it being understood that said trustees or trustee shall have the right to sell and convey all or any part of said property for cash, or to exchange all or any part thereof for other property or secured loans. [13]

Second: Out of the income, rents, issues and profits of said property, hereinafter referred to as income, in so far as the same shall be sufficient to do so, to make the payments hereinafter provided for; it being hereby expressly provided that all stock dividends and moneys received in consideration of the exchange or sale of said property shall be deemed to be a part of the principal of said property, and shall not be deemed to be income. The payments to be made by said trustees out of said income are the following and shall be made in the following order of priority:

EXHIBIT A—(Cont.)

1. To pay to said Frederick L. Brown, as the same is received, the first thirty thousand dollars (\$30,000) of income received from said trust property.

2. After the payment of said sum of Thirty Thousand Dollars (\$30,000).

(a) To pay to said Frederick L. Brown during the term of his natural life, on the first day of each calendar month, the sum of Five Hundred Dollars (\$500), or so much thereof as can be paid out of the amount of said income in the hands of said trustees or trustee upon the first of each such month.

(b) To pay to said Marian M. Brown during the term of her natural life on the first day of each calendar month, the sum of Five Hundred Dollars (\$500.00), or so much thereof as can be paid out of the income remaining in the hands of said trustees or trustee on the first day of each such month after paying said sum of Five Hundred Dollars (\$500) to said Frederick L. Brown.

(c) In the event of the death of either said [14] Frederick L. Brown or Marian M. Brown, to pay the survivor of them on the first day of each calendar month, during the term of his or her natural life, the further sum of Five Hundred Dollars (\$500), or so much thereof as can be paid out of the income remaining in the hands of said trustees

EXHIBIT A—(Cont.)

or trustee on the first of each such month.

3. Subject to the making of the payments above provided for and in order to provide a fund for the making of subsequent monthly payments, said trustees or trustee shall accumulate out of the said income, a fund of Twelve Thousand Dollars (\$12,000).

4. To pay to said Frederick L. Brown, Marian M. Brown, F. Walton Brown, Austen G. Brown and Marian Brown Kenyon in equal shares on the first day of each calendar month, the aggregate surplus, if any, of the income in excess of said sum of Twelve Thousand Dollars (\$12,000) which shall then remain in the hands of said trustees after making the monthly payments above provided for to said Frederick L. Brown and Marian M. Brown, or the survivor of them. In the event of the death of either said Frederick L. Brown or said Marion M. Brown, that part of the income which would be payable to such decedent if living, under the provisions of this subdivision 4, shall be paid by said trustees or trustee to the survivor of them. In the event of the death of said F. Walton Brown or said Austen G. Brown or said Marian Brown Kenyon, or either of them, the income above referred to which would be payable to such decedent if living, [15] shall be paid by said trustees or trustee, as follows:

(a) If such decedent leave surviving him

EXHIBIT A—(Cont.)

(or her) issue and spouse, to the children of such decedent and the issue of deceased children, per stirpes and not per capita, in equal shares, (four fifths ($\frac{4}{5}$) of) the portion of said income which such decedent would have received if living, (and the surviving spouse, one-fifth ($\frac{1}{5}$) of the portion of said income which such decedent would have received if living).

(b) If such decedent leave surviving him or her issue but no spouse, to the children of such decedent and the issue of deceased children per stirpes and not per capita, in equal shares, the portion of said income which such decedent would have received if living.

(c) If such decedent leave surviving him or her spouse but no issue, then to the surviving spouse of such decedent one-fifth of the portion of said income which such decedent would have received if living, and the remaining four-fifths ($\frac{4}{5}$) of the portion of said income which such decedent would have received if living shall be payable as if such decedent had not been mentioned in this subdivision 4 of this Paragraph Second.

(d) If there be no children or issue of deceased children or surviving spouse of such decedent, then the portion of said income which such decedent would have received if living shall be payable as [16] if said decedent had

EXHIBIT A—(Cont.)

not been mentioned in this subdivision 4 of this Paragraph Second.

Third: The trust hereby created shall terminate upon the death of the survivor of said Frederick L. Brown and said Marian M. Brown, and thereupon the title to said trust property shall vest absolutely in equal shares in F. Walton Brown, Austen G. Brown and Marian Brown Kenyon, or in the event that any of them be not living, the share of such decedent or decedents shall vest in equal shares, as follows:

(a) If such decedent leave surviving him or her issue and spouse, four-fifths ($4/5$) of the interest in said trust property which such decedent would have received if living shall vest in equal shares in his or her children and the issue of his or her deceased children, per stirpes and not per capita, and the remaining one-fifth ($1/5$) of the interest in said trust property which he or she would have received if living shall vest in the surviving spouse.

(b) If such decedent leave surviving him or her issue but no spouse, then the interest in said trust property which such decedent would have received if living shall vest in equal shares in his or her children and the issue of his or her deceased children, per stirpes and not per capita.

(c) If such decedent leave surviving him

EXHIBIT A—(Cont.)

or her spouse but no issue, then one-fifth ($1/5$) of the interest in said trust property which such decedent would have received if living shall vest in the surviving spouse and the title to the remaining four-fifths ($4/5$) thereof shall vest as if [17] such decedent had not been named in this Paragraph Third.

(d) If such decedent leave no issue or spouse surviving him or her, then the interest in said trust property which such decedent would have received if living shall vest as if such decedent had not been named in this Paragraph Third.

Fourth: In case during the continuance of said trust said trustees or any of them shall die, resign or become incapable of acting hereunder, then the following named persons in the following order, to-wit: Marian M. Brown, Marian Brown Kenyon, Mary Clark Brown and Annie Scripps Brown shall successively become trustees hereunder to fill the vacancies created by such death, resignation or incapacity, it being the intention of the parties hereto that there shall always be three trustees so long as there remain three persons willing and able to act as such trustees from the persons now acting as trustees and the persons above named, designated to fill the vacancies.

Fifth: Said F. Walton Brown and said Austen G. Brown shall each have the right to make assignments of not exceeding a total of one-half of his

EXHIBIT A—(Cont.)

beneficial life interest in the income of said trust property to his wife, and/or to his child or children who shall have reached the age of majority at the time of such assignment, but otherwise all of the beneficiaries hereunder shall be subject to the provisions of the following paragraph and to the restraints therein provided for, and in the event of any such assignment to wife or child, the assignee shall be subject to said provisions and restraints, and no such assignment shall anyway affect the distribution of the principal or income of the trust property upon the death of the assignor.

Sixth: With the exceptions mentioned in the last paragraph, each and every beneficiary under this trust is hereby restrained [18] from and/or shall be without authority, right or power to sell, transfer, pledge, mortgage, hypothecate, alienate, anticipate or in any manner affect or impair his, her or their beneficial and legal rights, title, interest, claims and estates in and to the income and/or principal of this trust during the entire term hereof, nor shall the rights, titles, interests and estates of any beneficiary hereunder be subject to the rights or claims of creditors or any beneficiary nor subject to nor liable to any process of law or court, nor be transferable by operation of law in any manner whatsoever, and all of the income and/or principal under this trust shall be transferable, payable and deliverable only, solely, exclusively and personally to the above designated beneficiaries hereunder at the time entitled to take the same under

EXHIBIT A—(Cont.)

the terms of this trust or the duly appointed guardian of such beneficiary, and the personal receipt of the designated beneficiary hereunder or of the guardian shall be a condition precedent to the payment or delivery of the same by said trustees to each such beneficiary.

Seventh: The trustees or trustee hereunder shall be entitled to no compensation for their services in the administration of the trust hereby created except such as may be agreed to in writing by all of the beneficiaries hereunder.

In witness whereof the parties hereto have set their hands this 15th day of August, 1923.

FREDERICK L. BROWN

MARIAN M. BROWN

Trustors

FREDERICK L. BROWN

F. WALTON BROWN

AUSTEN G. BROWN

Trustees for Frederick L. Brown, Marian M. Brown, F. Walton Brown, Austen G. Brown and Marian Brown Kenyon. [19]

POINTS AND AUTHORITIES UPON CLAIM
FOR REFUND

In the Estate of Frederick L. Brown, Deceased.

Date of Death—August 8, 1934.

The transfer in trust made by the above named decedent in August, 1923, is not subject to tax and

no part of the property transferred should have been included in the gross estate of said decedent by the Commissioner of Internal Revenue.

Hasset v. Welch, Helvering v. Marshal, 303 U. S. 115, 82 Lawyers' Edition 858; Commissioner of Internal Revenue v. Kaplan (C. C. A. First Circuit), 102 Fed. (2d) 229; First Nat'l Bank of Boston v. Welsh (Dist. of Mass.), 24 Fed. Supp. 695; Blakeslee v. Smith (Dist. of Conn.), 26 Fed. Sup. 28; Webster v. Commissioner, 38 B. T. A. 273, Adv. Sheet Dec. No. 40; Estate of Kellogg, 40 B. T. A., Advance Sheet Nov. 22, 1939, #139. [20]

EXHIBIT "B"

Treasury Department
Washington

Office of Commissioner
of Internal Revenue.

Address Reply to Com-
mission of Internal Revenue

and Refer to

MT-ET-7083-6th California

Date of Death—August 7, 1934

Jul-3 1936

Austin G. Brown, et al., Executors,
230 Prospect Street,
La Jolla, California.

Sirs:

A deficiency in the Federal Estate tax liability of the above-named estate is hereby proposed as

EXHIBIT B—(Cont.)

the result of an examination of the return, Form 706, the Revenue Agent's report, and other data on file.

If you acquiesce in the proposed deficiency, you are requested to execute and forward the enclosed Form 890, which is a waiver of the statutory restrictions upon the immediate assessment and collection of the deficiency. The submission of the waiver will expedite the closing of the case and will also lessen the accumulation of interest, since the interest period will then terminate thirty days after filing of the waiver or on the date of assessment, whichever is earlier. Should you desire to consent to the assessment and collection of only a part of the deficiency, the waiver may be executed for such partial amount. The execution of the waiver does not prejudice your right to file a claim for refund of all or any portion of the tax. [21]

The issuance of this notice does not permit a petition to the United States Board of Tax Appeals. However, a protest against the proposed deficiency may be filed within 30 days from the date of this letter. If a hearing is desired in this office, or if no hearing is contemplated, the protest should be filed with this office. If a hearing is desired in the local division, the protest should be filed with the Internal Revenue Agent in Charge, Los Angeles Division. A protest must be filed in duplicate, and (a) present fully the grounds upon which made, supported by the evidence relied upon, and (b)

EXHIBIT B—(Cont.)

state whether a hearing is requested. Any statements of fact included therein must be under oath.

If the case cannot be closed upon the basis of a waiver, or if a protest is not filed within the specified time, a formal notice of deficiency will be issued under section 308(a) of the Revenue Act of 1926, as amended, and you may then petition the United States Board of Tax Appeals for redetermination of the tax liability.

A copy of this letter is being forwarded to the Internal Revenue Agent in Charge at 939 South Broadway, Los Angeles, California.

Examination of the return discloses the following:

EXHIBIT B—(Cont.)

| | <u>Returned</u> | <u>Tentatively Determined</u> | |
|---|-----------------|-----------------------------------|-------------|
| Gross estate | \$ 43,768.87 | \$189,552.82 | |
| Deductions (1926 Act) | 108,976.25 | 107,779.85 | |
| Net estate (1926 Act) | \$ 0.00 | \$ 81,772.97 | |
| Gross estate | \$ 43,768.87 | \$189,552.82 | |
| Deductions (1932 Act) | 58,976.25 | 57,779.85 | |
| Net estate (1932 Act) | \$ 0.00 | \$131,772.97 | [22] |
| 1. Gross tax (1926 Act) | \$0.00 | \$ 1,135.46 | |
| 2. Credit for gift tax | 0.00 | 0.00 | |
| 3. Gross tax less gift tax credit | 0.00 | 1,135.46 | |
| 4. Credit for estate or inheri- tance tax | 0.00 | 677.06 | |
| 5. Net tax (1926 Act) | \$0.00 | | \$ 458.40 |
| 6. Total gross taxes (1926 and 1932 Acts) | \$0.00 | \$ 9,412.76 | |
| 7. Gross tax 1926 Act | 0.00 | 1,135.46 | |
| 8. Gross additional tax | \$0.00 | \$ 8,277.30 | |
| 9. Credit for gift tax | 0.00 | 0.00 | |
| 10. Net additional tax | 0.00 | | 8,277.30 |
| 11. Total net tax | \$0.00 | | \$ 8,735.70 |
| Amount assessed as deficiency pursuant to waiver | 0.00 | | 0.00 |
| Deficiency | | | \$ 8,735.70 |

EXHIBIT B—(Cont.)

The deficiency bears interest at the rate of 6 per cent per annum from one year after the decedent's death to the date of assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

The deficiency results from the following adjustments:

GROSS ESTATE

| | <u>Returned</u> | <u>Tentatively Determined</u> |
|------------------------------|-----------------|-----------------------------------|
| Stocks and Bonds | | |
| Item 3 | \$ 72.63 | \$ 318.80 |
| Item 4 | 600.00 | 3,530.73 |
| Other Miscellaneous Property | | |
| Item 8 | 300.00 | 355.00 |

[23]

GROSS ESTATE (Cont'd.)

Transfers

| | <u>Returned</u> | <u>Tentatively Determined</u> |
|---|-----------------|-----------------------------------|
| The following described property is included in the gross estate under the provisions of Section 302(c) of the Revenue Act of 1926, as amended: | | |
| 31% of 130¼ shares Gardena Syndicate | \$ 0.00 | \$142,552.05 |

DEDUCTIONS

| | <u>Tentatively Determined</u> | <u>Returned</u> |
|-------------------------------|-----------------------------------|-----------------|
| Debts of decedent | | |
| Item 4—accrued interest....\$ | 3.60 | \$ 0.00 |
| Unpaid mortgages | | |
| Item 1 | 0.00 | 1,200.00 |
| To balance | 146,980.35 | |

EXHIBIT B—(Cont.)

The amount claimed under unpaid mortgages is disallowed since it appears that this item did not represent an outstanding obligation of the decedent at the date of his death.

CREDIT

Credit for State estate, inheritance, legacy, or succession taxes is allowed in the amount paid, and in respect to which the evidence is required by Article 9, Regulations 80 has been submitted. Please advise when the additional credit evidence may be expected.

If the full eighty per cent credit is allowed the net deficiency tax will be \$8,504.39. Execution of the enclosed waiver as to that amount will enable the Bureau to assess the full amount of the probable net tax and expedite the closing of the case.

Respectfully,

(Sgd) D. S. BLISS,

Enclosure: Deputy Commissioner.

Waiver. [24]

EXHIBIT C

Treasury Department
Washington

Office of

Commissioner of Internal Revenue Apr. 1, 1940

Address reply to
Commissioner of Internal Revenue
and refer to

MT-ET-7083-6th California

Estate of Frederick L. Brown

Date of Death—August 8, 1934.

Austen G. Brown, et al., Executors,
230 Prospect Street
La Jolla, California.

Gentlemen:

The Bureau has examined the claim filed by you on December 15, 1939, for refund of \$9,534.60 Federal estate tax paid on behalf of the above-named estate under the provisions of the Revenue Act of 1926, as amended.

The claim is based upon the contention that 31 per cent of 130 $\frac{1}{4}$ shares Gardena Syndicate, valued at \$142,552.05, was erroneously included in the determined value of the gross estate.

The estate has cited in support of its claim, among other cases, the decision in the case of Frederick R. Kellogg, 40 B. T. A. 139. The Commission does not acquiesce in the decision *in the decision* in the Kellogg case and holds that the transfer of the full value of the trust in question reduced only by the value of the life estate in decedent's wife is subject to inclusion in the gross estate.

As the amount included is less than what might have been included in the gross estate there is no overassessment of estate tax [25] in this case. Accordingly, your claim filed December 15, 1938, for refund of \$9,534.60 of the Federal estate tax paid

on behalf of this estate under the provisions of the Revenue Act of 1926, as amended, is hereby rejected in its entirety.

Respectfully,
GUY T. HELVERING,
Commissioner,

By: ADELBERT CHRISTY,
Acting Deputy Commissioner.

[Endorsed]: Filed Feb. 13, 1941. [26]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant in the above entitled action and, in answer to plaintiffs' complaint, admits, denies and alleges:

I.

Admits the allegations contained in Paragraph I thereof.

II.

Admits the allegations contained in Paragraph II thereof.

III.

Denies the allegations contained in Paragraph III thereof except that defendant admits that a true copy of said Trust Indenture is attached to plaintiffs' complaint and marked Exhibit "A".

IV.

Denies the allegations contained in Paragraph IV thereof.

V.

Admits the allegations contained in Paragraph V thereof.

VI.

Admits the allegations contained in Paragraph VI thereof except that defendant denies that any of the determinations or acts of the Commissioner, referred to in said paragraph, were either wrongful or illegal.

VII.

Denies the allegations contained in Paragraph VII thereof. [27]

VIII.

Admits the allegations contained in Paragraph VIII thereof except that defendant denies that the determinations or claims of the Commissioner, therein referred to, were either wrongful or illegal.

IX.

Admits the allegations contained in Paragraph IX thereof except that defendant denies that the assessment, therein referred to, was either wrongful or illegal; and denies that there was no tax or interest in any amount due from plaintiffs.

X.

Admits the allegations contained in Paragraph X thereof except that defendant denies that the assessment, therein referred to, was either wrongful or illegal.

XI.

Denies the allegations contained in Paragraph XI thereof.

XII.

Denies the allegations contained in Paragraph XII thereof.

XIII.

Denies the allegations contained in Paragraph XIII thereof.

XIV.

Admits the allegations contained in Paragraph XIV thereof.

XV.

Admits the allegations contained in Paragraph XV thereof except that defendant denies that the Commissioner's rejection of plaintiffs refund claim and his refusal to pay to plaintiffs the moneys demanded by them in their said claim was or were either wrongful or illegal.

XVI.

Admits the allegations contained in Paragraph XVI thereof except that defendant denies that plaintiffs are entitled to said refund or any part thereof.

Wherefore, having fully answered, defendant prays that it be [28] hence dismissed with its costs in this behalf expended.

WM. FLEET PALMER,
United States Attorney.

EDWARD H. MITCHELL,
Assistant U. S. Attorney.

ARMOND MONROE JEWELL,
Assistant U. S. Attorney.

EUGENE HARPOLE,
Special Attorney, Bureau of
Internal Revenue.

By E. H. MITCHELL,
Attorneys for Defendant.

[Title of District Court and Cause.]

STIPULATION TRANSFERRING PROCEED-
ING TO CENTRAL DIVISION

It is hereby stipulated and agreed by and between the parties to the above entitled action that the said action may be transferred from the Southern District of California, Southern Division, to the Southern District of California, Central Division, and that the trial and all further proceedings in the above entitled action may be had in the Central Division at Los Angeles, California.

CLARK J. MILLIRON,
Attorney for Plaintiffs.

WM. FLEET PALMER
United States Attorney.

E. H. MITCHELL,
Assistant United States
Attorney.

ARMOND MONROE JEWELL,
Assistant United States
Attorney.

EUGENE HARPOLE,
Special Attorney,
Bureau of Internal Revenue.

By EUGENE HARPOLE,
Attorneys for Defendant.

Approved:

LEON R. YANKWICH,
Judge.

[Endorsed]: Filed Oct. 21, 1941. [30]

[Title of District Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the Plaintiff and the Defendant, by their respective attorneys, that the facts as hereinafter stated shall be taken as true, and that either party may prove such additional facts as are relevant and material and not inconsistent with those hereby stipulated.

That Austen G. Brown and Marion Brown Kenyon, the Executors of the Estate of Frederick L. Brown, Deceased, who died August 8, 1934, duly filed an estate tax return with the Collector of Internal Revenue at San Diego, California, on June 10, 1935, in which said return they showed no estate tax to be due. Thereafter an Internal Revenue Agent made an examination and valuation of the assets of the estate and made certain changes in the various items therein. In the revaluation of the estate and acting upon said report, the Commissioner of Internal Revenue determined that 31% of 130 $\frac{1}{4}$ shares of Gardena Syndicate, amounting to \$142,552.05, should be added to the gross estate.

The decedent during his lifetime and on the 15th day of [31] August, 1923, transferred to Frederick L. Brown, F. Walton Brown and Austen G. Brown, as trustees, 130 $\frac{1}{4}$ shares of the capital stock of Gardena Syndicate, a California corporation, by an instrument in writing, a copy of which is attached hereto and marked Exhibit "A".

That said indenture was in full force and effect at the time of the death of said Frederick L. Brown. That the entire tax for which refund is claimed by the Executors resulted from the inclusion in the gross estate of said decedent of the sum of \$142,-552.05 as the value of said 31% of said 130 $\frac{1}{4}$ shares of Gardena Syndicate stock transferred in trust under the conditions specified in said Exhibit "A". Without the inclusion of said stock the estate of said decedent was not of sufficient value to subject it to estate tax.

Dated: October 27, 1941.

CLARK J. MILLIRON,
Attorney for Plaintiffs.

WM. FLEET PALMER,
United States Attorney.

E. H. MITCHELL,
Assistant United States
Attorney.

ARMOND MONROE JEWELL,
Assistant United States
Attorney.

EUGENE HARPOLE,
Special Attorney,
Bureau of Internal Revenue.

By EUGENE HARPOLE,
Attorneys for Defendant.

[Here follows Exhibit A "Trust Indenture, dated August 15, 1923", which is fully set out on pages 19 to 27, inclusive.]

[Endorsed]: Filed Oct. 28, 1941. [32]

[Title of District Court and Cause.]

MINUTE ORDER AND MEMORANDUM DECISION

The above-entitled cause was heard upon the issues raised by the Complaint and the Answer thereto. The Court having heard the testimony, oral and documentary, and the cause having been submitted to the Court for decision, and the Court having considered the agreed statement of facts and the evidence and the law in the case and the arguments of counsel, now finds in favor of the plaintiffs and orders judgment that Plaintiffs do have and recover of the defendant the sum of \$9534.50, with interest thereon at the rate of six per cent per annum from March 1, 1937, and for costs herein.

The Court is of the view that 31 per cent of the 130 $\frac{1}{4}$ shares of Gardena Syndicate valued at \$142,552.05 should not have been included in the gross estate of Frederick L. Brown. The indenture of August 15, 1923, was a valid trust estate which conveyed irrevocably the estate to the trustees. The retention of a life income by the trustor did not prevent the estate from vesting so as to exclude it from the estate of Frederick L. Brown at the time of his death.

I have studied very carefully the cases relied on by the Government. (*Helvering v. Hallock*, 1940, 309 U. S. 106; *Commissioner of Internal Revenue v. Clise*, 9 Cir., 1941, #9652, and *Estate of Mary M. Hughes*, 1941, 44 B. T. A. #184). The Board of Tax Appeals in the majority opinion just cited assumes that *Helvering v. Hallock* overrules *May v. Heiner*, 1930, 281 U. S. 231. Important cases of [39] recent origin are not to be considered overruled by implication. Overruling by implication is no more favored than repealing by implication. And certainly, if Mr. Justice Frankfurter, who wrote the opinion and distinctly repudiated cases he considered inconsistent with the ruling the Court was about to make, had felt that *May v. Heiner*, *supra*, required either rationalization or outright repudiation, he would have said so. The fact that he did not is proof that that case stands unshaken.

And, as recently as 1938, the Court followed it in *Hassett v. Welch*, 1938, 303 U. S. 303.

Logically I cannot see how it is in any way impaired by that case. It is also significant that our own Ninth Circuit does not mention the case in *Commissioner v. Clise*, *supra*. And I find no warrant for the intimation of the majority of the Board of Tax Appeals in *Estate of Mary M. Hughes*, *supra*, that the *Hallock* case repudiated the *May v. Heiner* case. The *May* case can be defended both in the light of logic and legal experience. It recognizes trust estates which have been used for many years to vest title to property in others, the trustor

retaining a limited life interest. When they are made absolutely and without the retention of a power to revoke, they are given full recognition in taxation cases because title to the corpus passes out of the trustor irrevocably. (See my opinion in *Nicholson v. United States*, 1938, 25 Fed Sup 424) which was decided prior to the *Hallock* case and was followed by Judge Sweeney of the District Court of Massachusetts in *Terhune v. Welch*, 39 Fed Supp 434, decided on June 19, 1941). The Circuit Court of Appeals for the Third Circuit in *Commissioner v. Kellogg*, 119 F (2) 54, decided on March 20, 1941, also takes the view that trusts of the kind under consideration here and in *May v. Heiner*, *supra*, are not affected by the decision in the *Hallock* case.

Hence the decision above noted.

Findings and judgment to be prepared by counsel for the plaintiff under Local Rule 8.

Dated this 1st day of November, 1941.

[Endorsed]: Filed Nov. 1, 1941. [40]

[Title of District Court and Cause.]

OBJECTIONS TO FORM OF CONCLUSIONS OF LAW

Comes now the attorneys for the defendant, United States of America, and acknowledging receipt of a copy of plaintiff's proposed Findings of Fact and Conclusions of Law as of November 12, 1941, make the following objections thereto:

I.

That plaintiff's proposed Conclusions of Law No. I is compound and should be rendered simple by stating it in the form of two Conclusions of Law as follows: [41]

“I

“That said trust was not created in contemplation of death.

“II

“That said transfer in trust was not intended to take effect in possession or enjoyment at or after death.”

II.

Plaintiff's Conclusions of Law are incomplete for the reason they do not contain a conclusion that “there was (or was not) a possibility that the corpus of said trust would revert to the grantor or to his estate in the event that the named beneficiaries predeceased him.”

Dated: November 13, 1941.

WM. FLEET PALMER,

United States Attorney.

E. H. MITCHELL,

Asst. U. S. Attorney.

EUGENE HARPOLE,

Special Attorney,

Bureau of Internal Revenue.

By EUGENE HARPOLE,

Attorneys for Defendant.

[Endorsed]: Filed Nov. 13, 1941. [42]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above entitled action came on regularly for trial on October 28, 1941, on the Complaint and Answer, before the Court sitting without a jury, plaintiff appearing by Clark J. Milliron, and the defendant appearing by Wm. Fleet Palmer, United States Attorney, E. H. Mitchell, Assistant United States Attorney, Armond Monroe Jewell, Assistant United States Attorney, and Eugene Harpole, Special Attorney, Bureau of Internal Revenue; and evidence having been taken in part by stipulated facts and in part by oral and documentary evidence, and the matter having been duly submitted to the Court for decision, and the Court having considered the evidence and having rendered its decision in writing, makes the following Findings of Fact:

FINDINGS OF FACT.

The Court finds:

I.

That the plaintiffs, Austen G. Brown and Marian B. Kenyon, are, and at all times mentioned herein were, the duly appointed, qualified and acting Executors of the last Will and [43] Testament of Frederick L. Brown, deceased, who died on the 8th day of August, 1934, and bring this action in their capacity as such Executors.

II.

That on the 15th day of August, 1923, the afore-said Frederick L. Brown, deceased, and his wife, Marian M. Brown, deceased, by an instrument in writing, created a certain trust whereby $130\frac{1}{4}$ shares of the capital stock of Gardena Syndicate, a corporation organized and existing under and by virtue of the laws of the State of California, were transferred and delivered to Frederick L. Brown, F. Walton Brown and Austen G. Brown, or the successors of them, as trustees, and whereby said Frederick L. Brown transferred all his right, title and interest in and to said $130\frac{1}{4}$ shares of said stock to said trustees, and retained no right, title or interest in or to, or control over, said shares of stock or any thereof in said Frederick L. Brown, or said Marian M. Brown. That said trust was an irrevocable trust, providing that certain amounts of money were to be paid to the trustors, certain amounts were to accumulate and certain amounts were to be paid to other beneficiaries; said trust to terminate on the death of said Frederick L. Brown and said Marian M. Brown.

III.

That said trust was never revoked or modified and was in full force and effect at the time of the death of said Frederick L. Brown on August 8, 1934, and that said trust terminated according to its terms on February 8, 1940, on the death of said Marian M. Brown.

IV.

That no right of alteration or amendment, or other right of revocation or control was retained by Frederick L. Brown, deceased, or his said wife, Marian M. Brown, deceased, either alone [44] or with any other person.

V.

That the aforesaid 130 $\frac{1}{4}$ shares of Gardena Syndicate were acquired by Frederick L. Brown about the year 1906. In the year 1915 an oil well was being drilled near the property owned by Gardena Syndicate and said Frederick L. Brown, at that time, indicated a desire, if oil were ever discovered on the Gardena Syndicate property, to divide the stock with his wife and three children. That in the year 1922 said Gardena Syndicate entered into a lease for the drilling of an oil well on its property and said Frederick L. Brown again expressed a desire to divide said stock with his wife and children.

That the said children were unwilling to accept a gift of said stock from the said Frederick L. Brown, deceased, unless a substantial income to the said decedent and his wife was in some manner assured during the period of oil production.

VI.

That on August 15, 1923, the aforesaid trust was created in pursuance of the aforesaid desires of said Frederick L. Brown. At the time of the execution of said trust agreement, on August 15, 1923.

said Frederick L. Brown, deceased, was in excellent health and was of the age of about 56 years, and that he survived the execution of said lease by approximately eleven years.

VII.

That said trust indenture provided that the first \$30,000.00 income received was to be paid to said Frederick L. Brown, deceased, and in addition thereto he should receive from the income of said trust the sum of \$500.00 per month during his lifetime; that his wife, Marian M. Brown, should receive from said trust the sum of \$500.00 per month during her lifetime, and in addition to said amounts the said Frederick L. Brown, deceased, was [45] to receive one-fifth ($1/5$) of any income in excess of said amounts, and that on the death of either Frederick L. Brown, or Marian M. Brown, the survivor of them would receive a further sum of \$500.00 per month out of the income of said trust. The trust further provided that the sum of \$12,000.00 should be accumulated out of the income for the purpose of assuring the aforesaid payments. The balance of the income of said trust was to be paid to other beneficiaries named in said trust.

VIII.

That on June 10, 1935, the plaintiffs herein as Executors of the last Will and Testament of said Frederick L. Brown, deceased, duly filed an estate tax return with the Collector of Internal Revenue

of the Sixth District of California, which said return disclosed no estate tax whatsoever to be due.

IX.

That thereafter the United States of America, through the Commissioner of Internal Revenue, determined the total value of the gross estate to be the sum of \$189,552.82, and included in said value the sum of \$142,552.05 as the value of 31% of said 130 $\frac{1}{4}$ shares of stock of Gardena Syndicate transferred in trust, as aforesaid, on the grounds that said stock should be included in the gross estate under the provisions of Section 302(c) of the Revenue Act of 1926, as amended.

X.

That the Commissioner determined that there was due from the plaintiffs the sum of \$8,735.70 tax and \$798.90 interest, a total of tax and interest in the amount of \$9,534.60, and that thereafter, on demand of the Collector of Internal Revenue of the Sixth District of California, the plaintiffs herein, on March 1, 1937, paid to said Collector of Internal Revenue said sum of \$9,534.60. [46]

XI.

That without the inclusion of the value of said stock in the estate of said decedent said estate was not of sufficient value to subject it to estate tax.

XII.

That no part of the value of said trust estate

was a part of the gross estate of said Frederick L. Brown, deceased.

XIII.

That on December 15, 1939, the plaintiffs duly filed a claim for refund of said estate tax and interest in the sum of \$9,534.00.

XIV.

That on April 1, 1940, the Commissioner of Internal Revenue rejected said claim for refund.

XV.

That no part of said tax has ever been repaid, refunded, credited or otherwise made available to plaintiffs herein.

CONCLUSIONS OF LAW.

As Conclusions of Law, from the foregoing facts, the Court concludes as follows:

I.

That said trust was not created in contemplation of and was not intended to take effect in possession or enjoyment at or after death.

II.

That 31% of said 130¼ shares of Gardena Syndicate, transferred in trust and valued at \$142,552.05, was not a part of the estate of Frederick L. Brown, and should not have been included in the gross estate of said Frederick L. Brown, deceased. [47]

III.

That the indenture of trust, dated August 15, 1923, was a valid trust estate which conveyed the estate irrevocably to the Trustees.

IV.

That the retention of a life income by the trustor did not prevent the estate from vesting in the trustees, and no part of the trust estate was taxable as a part of the estate of said Frederick L. Brown, deceased.

V.

That no estate tax was due from the plaintiffs herein.

VI.

That the aforesaid estate tax was paid to the Collector of Internal Revenue for the Sixth District of California on March 1, 1937, in the amount of \$8,735.70 tax and \$798.90 interest, a total of \$9,534.60, which said amount was wrongfully and illegally assessed and collected.

VII.

That plaintiffs are entitled to Judgment as prayed sum of \$9,534.60 with interest from March 1, 1937.

VIII.

That plaintiffs are entitled to Judgment as prayed for in the Complaint.

Let Judgment be entered accordingly.

Dated: November 25th, 1941.

LEON R. YANKWICH,
Judge.

Approved as to form, as provided by Rule 8.

WM. FLEET PALMER,
United States Attorney.

E. H. MITCHELL,
Assistant United States
Attorney.

ARMOND MONROE JEWELL,
Assistant United States
Attorney.

EUGENE HARPOLE,
Special Attorney, Bureau of
Internal Revenue.

By
Attorneys for Defendant.

[Endorsed]: Filed Nov. 25, 1941. [48]

In the District Court of the United States
Southern District of California
Central Division.

At Law No. 1400-Y

AUSTEN G. BROWN and MARIAN B. KEN-
YON, Executors of the Estate of FRED-
ERICK L. BROWN, Deceased,
Plaintiffs,
vs.

THE UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

The above entitled action came on to be heard on the 28th day of October, 1941, before the Court sitting without a jury, plaintiff appearing by Clark J. Milliron, and defendant appearing by Wm. Fleet Palmer, United States Attorney, E. H. Mitchell, Assistant United States Attorney, Armond Monroe Jewell, Assistant United States Attorney, and Eugene Harpole, Special Attorney, Bureau of Internal Revenue, and said action having been tried upon the Complaint and Answer, upon Stipulation of Facts, and oral and documentary evidence, and the matters having been duly submitted to the Court for its decision, and the Court having considered the evidence and having rendered its decision in writing, and the Court having made written Findings of Fact and Conclusions of Law,

It Is Hereby Ordered, Adjudged and Decreed that the plaintiffs, Austen G. Brown and Marian B. Kenyon, Executors of the Estate of Frederick L. Brown, deceased, do hereby have and recover of and from the defendant, The United States of America, [49] the sum of \$9,534.40, together with interest thereon at the rate of six per cent per annum from March 1, 1937, making a total of \$., and for costs of suit herein incurred in the sum of \$.

Dated this 24th day of November, 1941.

LEON R. YANKWICH,

Judge.

Approved as to form, as provided by Rule 8.

WM. FLEET PALMER,

United States Attorney,

E. H. MITCHELL,

Assistant United States

Attorney,

ARMOND MONROE JEWELL,

Assistant United States

Attorney,

EUGENE HARPOLE,

Special Attorney, Bureau of

Internal Revenue,

By

Attorneys for Defendant.

[Endorsed]: Filed and Entered Nov. 25, 1941.

[50]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the United States of America, the defendant above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final Judgment entered in this action on November 25, 1941.

Dated: February 25, 1942.

WM. FLEET PALMER,

United States Attorney,

E. H. MITCHELL,

Asst. U. S. Attorney,

EUGENE HARPOLE,

Special Attorney, Bureau of
Internal Revenue.

By EUGENE HARPOLE,

Attorneys for Defendant.

Mailed copy to Atty. for Plfs. E. L. S.

[Endorsed]: Filed Feb. 25, 1942. [51]

[Title of District Court and Cause.]

STIPULATION EXTENDING TIME TO FILE
RECORD AND DOCKET CAUSE ON APPEAL.

It Is Hereby Stipulated by and between the parties hereto that the time of the defendant and appellant, United States of America, to file the record on appeal with the Circuit Court of Appeals for

the Ninth Circuit and docket the action therein may be, by the order of any Judge of the above entitled District Court, extended to and including the 26th day of May, 1942. [52]

Dated: March 27, 1942.

CLARK J. MILLIRON

Attorney for Plaintiffs.

WM. FLEET PALMER,

United States Attorney,

E. H. MITCHELL,

Asst. U. S. Attorney,

EUGENE HARPOLE,

Special Attorney, Bureau of
Internal Revenue.

By EUGENE HARPOLE

Attorneys for Defendant.

It Is So Ordered this 3 day of Apr., 1942.

BEN HARRISON

United States District Judge

[Endorsed]: Filed Apr. 3, 1942. [53]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET
CAUSE ON APPEAL AND FOR PREPA-
RATION OF RECORD ON APPEAL.

Good cause appearing therefor, It Is Hereby Ordered that the time within which to file the record and docket the above entitled cause in the United States Circuit Court of Appeals for the

Ninth Circuit be, and the same hereby, is extended to and including July 20, 1942.

Dated: This 22 day of May, 1942.

FRANCIS A. GARRECHT

Judge of the United States
Circuit Court of Appeal.

[Endorsed]: Filed May 25, 1942. [54]

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS TO
BE URGED UPON APPEAL

1. That the District Court erred in holding that the value of thirty-one per cent of the corpus of the irrevocable trust created by Frederick L. Brown, the decedent, on August 15, 1923, should be excluded from his gross estate upon his death in the year 1934, within the meaning of the provisions of Section 302(c) of the Revenue Act of 1926.

Dated: This 26th day of May, 1942.

WM. FLEET PALMER,

United States Attorney,

E. H. MITCHELL,

Asst. U. S. Attorney,

EUGENE HARPOLE,

Special Attorney, Bureau of
Internal Revenue.

By EUGENE HARPOLE

Attorneys for Defendant-
Appellant.

[Endorsed]: Filed May 27, 1942. [55]

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF
CONTENTS ON RECORD OF APPEAL

To the Clerk of the District Court of the United
States for the Southern District of California,
Central Division:

You are hereby requested to include the following
in the Record on Appeal herein:

1. The Complaint, together with the exhibits attached thereto;
2. Answer filed May 15, 1941;
3. Stipulation Transferring Proceeding to Central Division for trial; [56]
4. Stipulation of Facts filed at the trial of the case;
5. Minute Order and Memorandum Decision of District Court in favor of the Plaintiffs handed down November 1, 1941;
6. Defendant's Objections to Form of Proposed Conclusions of Law;
7. Court's Findings of Fact and Conclusions of Law dated November 25, 1941;
8. Judgment entered November 25, 1941;
9. Notice of Appeal filed February 25, 1941;
10. Stipulation and Order Extending Time to Docket Cause on Appeal to May 26, 1942;
11. Order Extending Time to Docket Cause on Appeal until July 20, 1942;
12. Designation of Points to be Relied upon on Appeal;

13. This Designation of the Contents of the Record upon Appeal;
14. Clerk's Certificate.

This transcript is to be prepared as required by law and the rules of this Court and the rules of the United States Circuit Court of Appeals for the Ninth Circuit and is to be filed in the office of the Clerk of said Circuit Court of Appeals at San Francisco, California.

Dated: This 26th day of May, 1942.

WM. FLEET PALMER,

United States Attorney,

E. H. MITCHELL,

Asst. U. S. Attorney,

EUGENE HARPOLE,

Special Attorney, Bureau of
Internal Revenue.

By EUGENE HARPOLE

Attorneys for Defendant-
Appellant.

[Endorsed]: Filed May 27, 1942. [57]

[Title of District Court and Cause.]

DESIGNATION OF ADDITIONAL PARTS
OF RECORD BY APPELLEE.

To the Clerk:

Appellee designates the following additional parts of the record which he considers material:

The Reporter's Transcript of the testimony of F. Walton Brown, offered and received in the case.

Dated June 3, 1942.

CLARK J. MILLIRON,
Attorney for Appellee

The undersigned hereby acknowledges service of a copy of [58] the foregoing Designation of Additional Parts of the Record.

WM. FLEET PALMER,
United States Attorney;
E. H. MITCHELL,
Asst. U. S. Attorney, and
EUGENE HARPOLE,
Special Attorney,
Bureau of Internal Revenue.

By EUGENE HARPOLE
Attorneys for Appellant.

[Endorsed]: Filed Jan. 3, 1942. [59]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
TRANSCRIPT OF RECORD

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 59, inclusive, contain full, true and correct copies of Complaint; Answer; Stipulation and Order Transferring Proceeding to Central Division; Stipulation of Facts; Minute Order and Memorandum Decision; Objections to Form of Conclusions of Law; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Stipulation Extending Time to File Record and Docket Cause on Appeal; Order Extending Time to Docket Cause on Appeal and for Preparation of Record on Appeal; Appellant's Statement of Points to be urged upon Appeal; Appellant's Designation of Contents of Record on Appeal; and Designation of Additional Parts of Record by Appellee, which together with the Original Reporter's Transcript transmitted herewith constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of the said District Court this 2 day of July, A. D. 1942.

[Seal]

EDMUND L. SMITH,

Clerk

By THEODORE HOCKE,

Deputy

TESTIMONY

The Witness: F. Walton Brown.

Direct Examination

By Mr. Milliron:

Q. What is your occupation, Mr. Brown?

A. I am an attorney.

Q. You were the attorney who drew trustee indenture, which is an exhibit in this case?

A. I did.

Q. Will you state when the matter of the transfer of the property from your father was first taken up with [3*] you?

A. Well, it is a long story. My father owned that stock in Gardena,—he owned that stock in the Gardena Syndicate from sometime in 1906 and the property was down here on Dominguez Hill.

We used to go down there to that property in the early days. There was an old sump on there that had some sulphur water in it which was believed to be an indication of oil on the property.

Then along in 1911 or 1912 or 1913,—I cannot give the exact date—a company started drilling an oil well on property near this property, and then the excitement was high.

Everybody hoped there would be oil on this Gardena Syndicate property. At that time I went down there a number of times with my father and we talked over the situation and he said at that time if he made any money out of the oil from that property, that he would divide it with my mother and the children.

*Page numbering appearing at top of page of original certified Reporter's Transcript.

(Testimony of F. Walton Brown.)

That well was not productive, and for a long time nothing happened in the way of oil development down there, but in 1921 or 1922 a lease of the property was made to the Union Oil Company or was rather made to the Burnham Exploration Company and the Union Oil Company developed it.

They drilled a well which came in sometime in—shortly before this trust indenture was made. When the oil well [4] came in, my father said that he wanted to carry out his previous statements that if any money came in out of the well, he wanted to divide it with the children.

He stated that he would give one-fifth of the stock he owned in the Gardena Syndicate to my mother, and one-fifth to my brother and one-fifth to my sister and one-fifth to himself and one-fifth to me. He retained one-fifth himself.

That was discussed both down where he lived with my mother, brother and sister and myself, and also he came up here quite frequently and it was also discussed with me many times.

The three children all said they would not be willing to accept such a gift because the extent of the oil there was uncertain and it might not last, and we did not feel that father and mother ought to give away the property without retaining in some way an income which would provide for them as long as they lived.

So my father asked me for my suggestion and I suggested this trust arrangement by which a provi-

(Testimony of F. Walton Brown.)

sion was made for income to him for life and a part of the income to the children, and then upon the death of himself and my mother the property would go to the children.

With that in view, I drew the trust indenture. It was discussed among all the family and they all said they felt it carried out that idea and the trust indenture was signed up and the property was transferred to the trustees. [5]

Q. What was the condition of your father's health in 1923 when this trust indenture was drawn?

A. It was very good.

The Court: He lived how many years after?

The Witness: I think it was eleven; he died in 1934.

The Court: This was drawn up in 1923?

The Witness: Yes.

The Court: August 23rd, and he died in August of 1934?

The Witness: Yes.

By Mr. Milliron:

Q. At the time this trust indenture was drawn, I might say, you were one of the trustees?

A. That is right.

Q. Named in this? A. Yes.

Q. And also one of the beneficiaries?

A. Yes.

Q. At the time this trust indenture was drawn, it provided for a life estate to your father, your mother and the three children?

(Testimony of F. Walton Brown.)

By Mr. Milliron:

Q. At that time, what persons were living? Who were [6] the prospective heirs under this trust, the prospective beneficiaries under this trust who were still living at the death of your father?

A. Well, my sister and brother and myself and my mother were all living. There were two, three, five, eight grandchildren then living.

At the time the trust indenture was entered into, there were only five grandchildren.

Q. Three grandchildren were born after the trust indenture was written?

A. Yes. No, I am wrong. There were only seven and not eight.

Mr. Milliron: That is all.

Mr. Harpole: No cross examination.

The Court: There is no cross examination?

Mr. Harpole: No.

The Court: Had any discussions been had before this oil prospecting began to materialize?

The Witness: I didn't hear you, your Honor.

The Court: Had any definite discussions been had between yourself and your father before the definite prospect of oil discovery materialized?

The Witness: We never discussed the details of how the matter would be arranged, but beginning before 1912 and 1913 he said to me if he got any money out of oil on that property he would divide it with the children. That was [7] about the extent of our discussion.

(Testimony of F. Walton Brown.)

The Court: All the children were adults at the time?

The Witness: The children were all adults at that time, yes.

The Court: Of course, you were not dependent upon your father?

The Witness: No, we were not dependent upon him, although he always helped us and was generous before that.

The Court: And how old was your father at the time this indenture was made in 1923?

The Witness: Fifty-six years old.

The Court: Fifty-six?

The Witness: Yes.

The Court: He died at the age of sixty-six?

The Witness: Sixty-seven.

The Court: Sixty-seven?

The Witness: Yes, sir.

The Court: All right.

Mr. Milliron: That is all, if the Court please. We have no further evidence.

The Court: Does the Government desire to present any evidence?

Mr. Harpole: No other evidence other than the stipulation that has been introduced by the plaintiffs.

[Endorsed]: Filed July 3, 1942. [8]

[Endorsed]: No. 10185. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Austen G. Brown and Marian B. Kenyon, Executors of the Estate of Frederick L. Brown, Deceased, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed July 3, 1942.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

Received copy of the within Appellant's statement of points to be urged upon appeal this 1st day of July, 1942.

CLARK J. MILLIRON

Attorney for Appellee.

In the United States Circuit Court of Appeals
for the Ninth Circuit
No. 10185

UNITED STATES OF AMERICA,
Appellant,
vs.

AUSTEN G. BROWN and MARIAN B. KEN-
YON, Executors of the Estate of FREDERICK
L. BROWN, Deceased,
Appellee.

APPELLANT'S STATEMENT OF POINTS
TO BE URGED UPON APPEAL.

1. That the District Court erred in holding that the value of thirty-one per cent of the corpus of the irrevocable trust created by Frederick L. Brown, the decedent, on August 15, 1923, should be excluded from his gross estate upon his death in the year 1934, within the meaning of the provisions of Section 302(c) of the Revenue Act of 1926.

Dated: This 1st day of July, 1942.

WM. FLEET PALMER,
United States Attorney,
E. H. MITCHELL,
Asst. U. S. Attorney,
EUGENE HARPOLE,
Special Attorney,
Bureau of Internal Revenue.

By EUGENE HARPOLE,
Attorneys for Defendant-
Appellant.
Federal Building,
Los Angeles, California.

[Endorsed]: Filed July 3, 1942.